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IN THE

Supreme Court of the United States

October Term, 1951

No. 308

E. A. LABORATORIES, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable Chief Justice and Associate Justice of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the decree entered by the United States Court of Appeals for the Second Circuit on June 20, 1951, enforcing in part and reversing in part an order issued by respondent pursuant to Section 10(c) of the National Labor Relations Act, as amended.

Opinions Below

The opinion of the Court of Appeals is reported at 188 F. 2d 885 and is printed in the record (R. A. p. 166).[1] The amended decision of the respondent is reported at 86 NLRB 711, and is printed in the record (B. A. 1-23). The intermediate report of the Trial Examiner is reported at 80 NLRB 637-699, and is printed in the record (B. A. 32-159). The decree of the Court of Appeals is printed in the record (R. A. 190-201).

Basis of Jurisdiction

Jurisdiction is invoked under Title 28, United States Code, Section 1254(1).

Summary Statement

Petitioner does not contest respondent's order in its entirety but challenges only the following portions thereof:

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[1] Numbers in parenthesis, when preceded by the following symbols, refer to printed pages of the following documents:

Symbol	*Document Referred To*
B. A.	Record printed in appendix of Board's brief.
R. A.	Record printed in appendix to petitioner's brief in the Court of Appeals, in which it was the respondent.
Tr.	Original typewritten transcript of record.

Exhibits filed with the Court of Appeals, but not printed, are referred to as "BX" (Board's Exhibit) and "RX" (Petitioner's Exhibit).

Whenever, in a series of references, a semi-colon appears, record references preceding the semi-colon are to the findings of the Board or the Trial Examiner; succeeding references are to supporting evidence.

1. The portion which directs petitioner to make whole the 427 persons named in Group IV of Appendix A to said order (B. A. 16-23) for any loss of wages from November 11, 1944 to the dates on which they were respectively reinstated (see 2(c) of Amended Order, B. A. 10).

2. The portion which directs petitioner to reinstate the 27 persons named in Group II of Appendix A to said order (B. A. 13-14) and to make them whole for any loss of wages suffered after September 26, 1945 (see 2(a) and 2(c) of Amended Order, B. A. 10).

3. The portion which directs petitioner, upon application, to reinstate the 34 persons named in Group III of Appendix A to said order (B. A. 15-16), if employment for them is immediately available, and if not, to place them on a preferential hiring list for employment (see 2(b) of Amended Order, B. A. 10).

4. The portion which directs petitioner, upon application of the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, C. I. O., to bargain with said Union as the exclusive bargaining representative of its employees (see 2(e) of Amended Order, B. A. 10).

The first of the above issues arises out of a strike which occurred on September 22, 1944, and the other three issues arise out of a strike which occurred on August 28, 1945.

1944 Strike

Petitioner is a New York corporation having its principal office and plant at Brooklyn, New York, where it is engaged in the manufacture and sale of automotive, air-

craft and marine accessories (B. A. 40; 846). On September 22, 1944 there was in effect between petitioner and its employees a collective bargaining agreement whereby petitioner's employees and their Union agreed not to participate in any strike (B. A. 41; 950).

On September 22, 1944, petitioner's employees, in violation of the above agreement, and without notice, participated in a strike (B. A. 41-42, 65, 69). The Union denied responsibility for the strike, asserting that the employees had acted spontaneously in protest against unfair labor practices allegedly committed by petitioner (B. A. 51, 65). Petitioner, on the other hand, contended that the strike had been deliberately planned by the Union for the purpose of aiding three officials[2] of the local Union who had been indicted on September 18, 1944 for having attempted, on August 5, 1944, to extort $1800.00 from petitioner's president, J. M. Aufiero, as the price for labor peace in petitioner's plant (B. A. 50-51; R. A. 132-139). For the reasons hereinafter discussed, respondent found it unnecessary to decide whether such was the purpose of the strike. Petitioner submits that the following evidence, as well as other evidence in the record, would have supported a finding that the sole purpose of the strike was to aid three arrested Union officials:

1. The attempt, in the latter part of August, 1944, of Paul Newman, a representative of the International Union who had been placed in charge of the Local Union (B. A. 65) to induce William Walzer, petitioner's attorney (R. A. 58-59), to prevail upon Aufiero to withdraw the charges against the arrested three (R. A. 58-59).

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[2] Joseph Rizzo, the President, Jerry Festa, the Vice-President, Rocco Laurenzano, a Committeeman (R. A. 80).

2. The fact that Newman (R. A. 2-3, 110-111) and six other Union officials (B. A. 67-69; 399-400, 523-526; R. A. 6-9, 10-14, 22-23) testified, early in the hearing, that they had no prior information about the strike, and that the Union had not planned the strike. By finding that the strike had been called by the officers of the Local Union (B. A. 69), the Examiner, in effect, found that this testimony was false. If the strike had a legitimate purpose there would have been no reason for the Union officials to have denied the fact that they had planned it.

3. The fact that the rank and file of employees were completely ignorant of the cause of a strike which deprived them of employment from September 22, 1944 to mid-December, 1944, or later (R. A. 15-17, 18-21, 24-28, 29-31).

4. The events of the important special meeting (R. A. 142) of the Local Union held on September 20, 1944, as revealed by the minutes thereof (R. A. 140-141).

5. The events of the violent meeting held by the Union on September 21, 1944, as testified to by Newman (R. A. 101-111, 114-115), and by Attianese (R. A. 41-55). The latter testified (R. A. 46-47), and the former virtually admitted (R. A. 115) that Rizzo and Festa (two of the arrested three Union officials), instigated a plan at that meeting for calling out the plant on the following morning. Based on Newman's testimony, the Examiner found that the strike was planned at this meeting (B. A. 68-69).

6. The fact that Graziose, a steward, in ordering Crisci, a rank and file employee, to join the strike, said "that I had to pitch in and help out so that we could get the boys out of whatever trouble they were in" (R. A. 55-57).

7. The fact that at a conciliation conference held shortly after the strike the Union took the position that it would call off the strike if the three arrested Union officials were reinstated (B. A. 74; R. A. 33-34, 59-64, 92-95, 98-100).

Because of the fact that the strike was in breach of contract and for the illegal purpose of aiding the arrested three, petitioner took the position that the contract was terminated (B. A. 905-909) and that all of its employees were discharged (B. A. 75; R. A. 35-36, 64).

After the conviction of the three men on October 20, 1944 the demand for their reinstatement was no longer involved (R. A. 117-118). The issue which prolonged the strike was whether everyone, including the union officers, committeemen and stewards, should be reemployed (the Union's position), or whether petitioner should have the right to discipline the strike leaders by selecting those to be reemployed (petitioner's position). At a hearing on October 23, 1944, before the Regional War Labor Board (B. A. 77; R. A. 143-148), petitioner stated that it would take back the great majority of the strikers so far as production permitted (R. A. 144, 146), but was unwilling to "forgive and forget" the misconduct of the union officials (R. A. 144) by reemploying them (R. A. 146). Petitioner further indicated that once the men returned, it would recognize and negotiate with whatever union they might designate as their bargaining agent (B. A. 78; 794-798; R. A. 145), including the C. I. O. (B. A. 795).

At these hearings, as well as on a number of other occasions during October and November 1944, the union asserted that there would be no return to work unless *all*

employees, *including the union officials,* were reinstated (B. A. 77, 98; R. A. 115-118).

On September 29, 1944 (B. A. 905-909), October 31, 1944 (B. A. 911-913), and November 8, 1944 (B. A. 914-915) petitioner distributed letters to most of the strikers inviting them to return to work, but as new employees (B. A. 76-77; 791-798; R. A. 64). These letters were not distributed to the union officers, committeemen or stewards (B. A. 81; 312-313, 791-793; R. A. 100). The November 8th letter (B. A. 914-915), known as the "Last Call for Dinner" letter (B. A. 81) requested the strikers to attend a meeting at 9:00 a.m. on November 11th at the plant, at which the management would explain the provisions which it had made for the reemployment of the strikers. Thus it appears that petitioner was willing and anxious to reemploy the rank and file employees on November 11, 1944, the very day on which the respondent has found that they were discriminatorily denied reinstatement.

On November 8th and November 9, 1944, the case was heard by the National War Labor Board at Washington, D. C. (B. A. 81), and both the union and petitioner maintained the same positions as they had before the Regional Board (BX 67). The National Board issued an order on November 9, 1944, directing petitioner to reinstate all employees on a seniority basis as soon as production permitted. The order granted petitioner the right to discharge those responsible for the strike, but directed that the validity of such discharges should be arbitrated under the provisions of the 1943 collective bargaining agreement (B. A. 79, 82; BX 75).

On November 10, 1944, a large number of the strikers

congregated in Kings County Court for the presentence hearing of the three extortionists (B. A. 83; 188-189). After completing the Court's official business, Judge Leibowitz, justifiably perturbed that so many employees were not contributing their needed services to the war effort (B. A. 432, 444), decided to assume the roll of peacemaker. As such, he was acting in a non-judicial capacity. Leibowitz asked Newman if he would lead these people back to work (B. A. 83; 189). The reply was that the people were anxious to return and had attempted to do so before, but that Aufiero wouldn't take them back (B. A. 83; 189, 360). Judge Leibowitz then asked Aufiero if this were true (B. A. 360). Aufiero denied it, saying that he wanted the people to return to work (B. A. 83; 360). Leibowitz then asked Aufiero if he would let the people go into the plant and go back to work if they were to come to the plant in the morning (B. A. 83; 189). According to Newman, Aufiero replied "I will open my plant tomorrow morning and these people can come back to work" (B. A. 84; 190). According to other witnesses, Aufiero's reply was to the effect that the doors were always open (B. A. 415, 445) and that "whenever they want to come back, they can come back" (B. A. 415). The latter reply would seem more accurate and it is consistent with the fact that Aufiero had invited the employees to attend a meeting at the plant at 9:00 a.m. on the following morning (B. A. 914-915).

On the next morning, a Saturday, at 7:30 a.m., a group of the strikers led by Newman appeared at the gates of the plant seeking admittance (B. A. 84; 190-191). The guard stated that there was nobody in the plant at that time, that he had received no orders to admit them, and that he would

not do so (B. A. 84; 191). The group thereupon returned to the union office (B. A. 84; 191). There is no evidence that at 9:00 a.m. on that morning the employees made any effort to attend the meeting to which they had been previously invited (B. A. 81). Several days thereafter, petitioner again indicated that, with the exception of the strike leaders, it would reemploy the strikers (B. A. 84-85; 192-193).

Early in December, the union abandoned its efforts to secure reinstatement of the strike leaders and authorized its members to seek reemployment individually (B. A. 86). The great majority of the strikers were reinstated by December 15, 1944 (B. A. 87; 856-869).

On January 26, 1945, the union filed with the National Labor Relations Board the original charge in this case (BX 63). The only matter in this charge which related to the 1944 strikers was an allegation that respondent had on September 22, 1944, locked out and continued to lock out approximately 300 employees because of their union activity (BX 63). On January 31, 1945, the Director of Economic Stabilization issued an order cancelling all petitioner's government contracts unless by February 10, 1945 it observed the directives of the War Labor Board (B. A. 107; 804-805; R. A. 136).

The union and the petitioner commenced settlement discussions in the latter part of March, 1945 (B. A. 107; R. A. 65-66). The petitioner insisted that any settlement had to include a waiver of any claims for back pay (R. A. 67) and that charges theretofore filed by the union with the Board be withdrawn (R. A. 69-70). The union agreed (R. A. 70), but they could not obtain the consent of the National Labor

Relations Board (R. A. 70-71). This almost prevented the deal (R. A. 71). However, to obviate this difficulty, the union represented by a letter, dated April 3, 1945 (R. A. 149), that only 23 persons were involved in the said pending charges (R. A. 71-74, 97-98).

The settlement was reduced to a written agreement (R. A. 126-129) in which the petitioner agreed to (R. A. 127-128) and did (a) offer reinstatement to all 1944 strikers not theretofore reemployed (R. A. 38-40); (b) arbitrate the validity of 17 discharges which occurred in the early part of 1945 (see Arbitrator's award, RX 43, Issue No. 2); (c) resume check-off of dues (R. A. 40-41); (d) discontinue an action for $500,000 brought by petitioner against the union for violation of the provisions of the agreement between the petitioner and the union (R. A. 120-124); (e) arbitrate such of the 23 grievances pending on September 22, 1944 as the union desired (see Arbitrator's award, RX 43), and (f) reinstate the collective bargaining agreement (R. A. 126). The union agreed not to file with the Board any further charges arising out of the 1944 strike (R. A. 128) and represented (R. A. 97-98, 128-129) that the charges which were then pending with the Board involved only the 23 persons referred to in the April 3rd letter (R. A. 149), which was incorporated in the settlement agreement (R. A. 73-75, 98, 129).

As late as November, 1945, the union recognized that it was bound by that agreement when it executed the first amended charge in this case (BX 64) in which the only allegation relating to the 1944 strikers was a charge that petitioner had discriminatorily discharged the 23 persons named in the settlement agreement. In clear violation of the

agreement, and on June 6, 1946, the union, while retaining the benefits it had received under the settlement agreement, repudiated its obligation not to file further charges by filing the second amended charge (B. A. 839-844) alleging that petitioner wrongfully refused to reinstate all the 1944 strikers. The union thereby subjected petitioner to a possible liability for back pay for more than 400 employees—the precise contingency which the parties had agreed to avoid.

Petitioner contended that the strike was illegal (1) because it was in breach of contract and (2) because its sole purpose was to compel respondent to withdraw charges against the three extortionists, and that the strikers were not, therefore, entitled to back pay.

The Trial Examiner ruled as a matter of law that the strike was not in breach of contract because it was caused by petitioner's prior unfair labor practices and prior contract violations (B. A. 97). This ruling is in conflict with decisions of the Board that an employer may discharge employees who strike in breach of contract even though the strike was provoked by the employer's unfair labor practices (*Matter of National Electric Products Corp.*, 80 NLRB 995) or prior contract violations (*Matter of United Elastic Corp.*, 84 NLRB 768, 773).

The Trial Examiner, while admitting that the arrests of the three criminals was one of the factors which caused the strike (B. A. 69), found that the strike was not for the illegal purpose of aiding the three criminals, because it was also caused by petitioner's prior unfair labor practices (B. A. 69-72), and because the Union Committee, in voting to strike, did so in the good faith belief that the three men

were innocent (B. A. 74). Inasmuch as the union officials never testified as to why they voted to strike, but falsely denied that they had planned the strike, there is no evidence to support the latter finding.

The Board declined to determine whether the strike was in breach of contract or for an illegal purpose (B. A. 2). It found that petitioner had condoned any misconduct of the rank and file by its repeated offers to reemploy them (B. A. 3). The Board also found that, even though petitioner had discharged the Union officials for participating in the strike, Aufiero's statement of November 10, 1944, to Judge Leibowitz that "these people can come back to work" was intended to embrace the Union officials, and constituted a waiver and condonation of any prior misconduct, and of the prior discharges of the Union officials (B. A. 3-4). The Board concluded that the Union officials, therefore, like the rank and file employees, became undischarged strikers whom petitioner was bound to reinstate upon unconditional application, and that its refusal to do so on November 11, 1944, was unlawful (B. A. 4). The Board accordingly awarded back pay to all of the 1944 strikers from November 11, 1944 to the dates on which they were respectively reinstated (B. A. 4).

The Court of Appeals held that respondent's finding of condonation was supported by substantial evidence on the record as a whole (R. A. 168); and accordingly enforced that portion of the order awarding back pay to the 1944 strikers (R. A. 191-192).

1945 Strike

By its terms (B. A. 950), the 1943 labor contract was to expire 90 days after May 7, 1945, the day of the cessation

of the hostilities with Germany (B. A. 115). On a number of occasions between June 9th and August 17, 1945, the Union requested the opening of negotiations leading to a new contract (B. A. 115). Walzer testified that the reason for petitioner's refusal to bargain was because it doubted whether the Union still represented a majority of the employees in the bargaining unit (B. A. 115, 125). The respondent concluded that petitioner's refusal to bargain constituted a violation of Section 8(5) of the Act (B. A. 8, footnote 7).

On August 22, 1945, the Union held a meeting at which the filing of a strike notice under the War Labor Disputes Act was authorized (B. A. 120). Such a notice was filed on August 27th (B. A. 120; 611; R. A. 130-131). On the same day another meeting of the Union was held, at which an immediate strike was authorized (B. A. 120). On August 28th petitioner's employees struck (B. A. 120).

The respondent found that after the termination of the strike on October 12, 1945, the 27 persons named in Group II of Appendix A (B. A. 13-14) applied for and were discriminatorily refused reinstatement (B. A. 135). The respondent's amended order directs the reinstatement of these 27 persons (B. A. 10). That order also requires petitioner, on application, to reinstate, or place on a preferential hiring list, the 34 persons named in Group III of Appendix A to said order (B. A. 4-6, 10, 15-16).

Neither the International nor Local 844 has ever been certified as the bargaining agent for petitioner's employees (B. A. 8, footnote 6). The preamble to the labor agreement (B. A. 927-951) of November 7, 1943, indicates that the International and Local 844 were parties thereto, and they

1945 Strike

1. Did the Court of Appeals, after having decided that the violation by the strikers of the War Labor Disputes Act could not be disregarded, err by determining for itself in the first instance the appropriate sanction for such violation? In the alternative, did the Court of Appeals err by failing to hold that the appropriate sanction for the violation of the War Labor Disputes Act was to deny the strikers an award of reinstatement and back pay, or at least an award of back pay?

2. Did the Court of Appeals err in holding that the respondent had the power to order petitioner to bargain with the International Union, even though the authority, if any, of that Union to represent petitioner's employees was a joint authority which terminated with the legal death of the Union on August 9, 1946?

Reasons for Granting Petition

1944 Strike

1st Question: If, as petitioner contends, the respondent's finding of condonation of the misconduct of the Union officials was not supported by substantial evidence on the record as a whole, the Court of Appeals has sanctioned such a departure by respondent from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. A grave miscarriage of justice will occur if petitioner is compelled to award back pay to illegal strikers upon the basis of respondent's finding that petitioner condoned the misconduct of the

Union officials, if such finding is not supported by substantial evidence on the record as a whole.

2nd Question: The respondent, in the case at bar, on the authority of its prior decision in *Matter of Draper Corporation,* 52 NLRB 1477, enforcement denied on other grounds, *N. L. R. B.* v. *Draper Corporation,* 4 Cir., 145 F. 2d 199, has determined that the rank and file employees are entitled, under the National Labor Relations Act, to an award of back pay based upon their group application for reinstatement, even though such application was conditioned on the reinstatement of the Union officials whom petitioner, on the assumption that the finding of condonation is supported by substantial evidence, was required by said Act to reinstate, but whom petitioner believed it had the right to refuse to reinstate, and, even though petitioner was at all times willing to reinstate the rank and file employees. This determination was necessarily sustained by the Court of Appeals, although not mentioned in its opinion. The question of whether the policies of the National Labor Relations Act are effectuated by awarding back pay to a large group of strikers based upon an application for reinstatement conditioned upon the reinstatement of a small group of strikers whom the employer, as a matter of fact, is obliged to reinstate, but whom he believes in good faith he has the right to refuse to reinstate, is an important federal question, affecting the rights of both employers and employees, which has not been, but should be, settled by this Court.

3rd Question. The mere fact that the respondent could properly determine that the policies of the National Labor Relations Act would be effectuated by an award of back

pay, is not sufficient to sustain such an award unless the respondent, in making such a determination, clearly indicates the factors which induced it to do so (*Phelps Dodge Corp.* v. *N. L. R. B.*, 313 U. S. 177, 197; *N. L. R. B.* v. *Don Juan, Inc.*, 2 Cir., 178 F. 2d 625). In its amended decision it does not appear that respondent, if it thought that the strike was in breach of contract or for an illegal purpose, intended to depart from its prior decisions (*Matter of Thompson Products, Inc.*, 70 NLRB 13 and *Matter of Carey Salt Co.*, 70 NLRB 1099) that, under such circumstances, the policies of the Act would best be effectuated by ordering that such strikers, where their misconduct was condoned prior to their application for reinstatement, be reinstated, but *without* back pay. The decision of the Court of Appeals sustaining the respondent's amended decision, even though respondent failed to indicate whether it was intentionally departing from its prior policy determinations was, it is respectfully submitted, a decision of an important federal question in a way probably in conflict with the *Phelps Dodge* case, *supra*, and also probably in conflict with its own prior decision in the *Don Juan* case, *supra*.

4th Question: The decision of the Court of Appeals that the settlement agreement of April 5, 1945 did not prevent the respondent from awarding back pay to the 1944 strikers is in conflict with the decision of the Court of Appeals for the Fifth Circuit in *N. L. R. B.* v. *Dorsey Trailers*, 179 F. 2d 589, 592.

1945 Strike

1st Question: The decision of the Court of Appeals that a violation of the War Labor Disputes Act precluded an

award of back pay under the National Labor Relations Act for wages lost during the thirty day cooling off period, is in conflict with the decision of the Court of Appeals for the Sixth Circuit in *Hamilton* v. *N. L. R. B.*, 160 F. 2d 465, certiorari denied, sub nom. *Kalamazoo Stationery Co.* v. *N. L. R. B.*, 332 U. S. 762 that a violation of the War Labor Disputes Act has no bearing on the rights of employees under the National Labor Relations Act. Petitioner submits that this question was correctly determined by the Court of Appeals for the Second Circuit, but that that Court then committed error by deciding for itself in the first instance the appropriate sanction. Having determined that the violation of the War Labor Disputes Act barred the respondent from awarding employees all their rights under the National Labor Relations Act, the Court of Appeals should have remanded the case to the respondent for a consideration of what sanction would best effectuate the policies of the Act. In the alternative, petitioner urges that, assuming that the Court of Appeals had the right to determine the appropriate sanction in the first instance, it erred by not holding that the policies of the Act would best be effectuated by denying reinstatement and back pay, or at least back pay, to employees who strike in violation of the War Labor Disputes Act.

2nd Question: The question of whether a parent union, which together with one of its local unions, had been jointly recognized as the bargaining agent, is entitled to continue to act as the sole bargaining agent after the legal death of the local union terminates the joint agency, is an important question of federal law which has not been, but should be, settled by this Court.

WHEREFORE, it is respectfully submitted that this petition for writ of certiorari to review the decree of the Court of Appeals for the Second Circuit should be granted.

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IN THE

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No. .....

E. A. LABORATORIES, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinions below have been referred to in the petition for writ of certiorari under the same caption.

Jurisdiction

The statement as to jurisdiction has been set forth in the petition.

Statement of the Case

The facts have been stated in the Summary Statement in the petition.

Specifications of Error

1944 Strike

1. The Court of Appeals erred in holding that the respondent's finding that petitioner condoned the misconduct of the Union officials in calling and participating in a strike in breach of contract and for an illegal purpose, was supported by substantial evidence on the record as a whole.

2. Notwithstanding the fact that petitioner may have condoned the misconduct of the Union officials, the strikers were not entitled to back pay on the basis of their group application of November 11, 1944 for reinstatement because such application was conditioned on the reinstatement of the Union leaders. Therefore the Court of Appeals erred in sustaining respondent's order awarding back pay to the strikers.

3. The Court of Appeals erred by not remanding the case to respondent with directions to make findings as to whether the strike was in breach of contract and for an illegal purpose, and, if so, to determine whether the policies of the Act would be effectuated by an award of back pay under such circumstances.

4. The Court of Appeals erred in holding that respondent properly refused to give effect to the settlement agreement of April 5, 1945 whereby the great majority of the employees waived their claims to back pay.

1945 Strike

1. The Court of Appeals, after having decided that the violation of the War Labor Disputes Act by the strikers could not be disregarded, erred by determining for itself

in the first instance the appropriate sanction for such violation. In the alternative the Court of Appeals erred by failing to hold that the appropriate sanction for the violation of the War Labor Disputes Act was to deny the strikers an award of reinstatement and back pay, or at least an award of back pay.

2. The Court of Appeals erred in holding that the respondent had the power to order petitioner to bargain with the International Union, because the authority, if any, of that Union to represent petitioner's employees was, at most, a joint authority which terminated with the legal death of the Local Union on August 9, 1946.

ARGUMENT

1944 Strike

1. ***The Court of Appeals erred in holding that the respondent's finding that petitioner condoned the misconduct of the Union officials in calling and participating in a strike in breach of contract and for an illegal purpose, was supported by substantial evidence on the record as a whole.***

As shown in the petition (pages 4-6), the Board could have found that the union officials had been guilty of misconduct in calling a strike in violation of a no-strike clause with the purpose of compelling petitioner to withdraw the prosecution against three union officials who had been indicted for attempting to extort monies from petitioner in exchange for labor peace. In view of the grievous nature of such misconduct, a finding that petitioner condoned it, should be based upon clear and convincing evidence. With one exception, all witnesses to the incident

before Judge Leibowitz testified that the substance of Aufiero's agreement was a promise that petitioner would take back "these people" (B. A. 189-190, 293, 445), or its "employees" (B. A. 280, 415) or "the workers" (B. A. 445). Each of these terms was ambiguous, it not being clear whether they were intended to embrace all the strikers, including the Union officials, or merely the rank and file employees. The respondent recognized this ambiguity by making, in its amended decision, a specious argument that the term "these people" included the Union officials, because petitioner had, prior to November 10th, already condoned the misconduct of the rank and file employees and, therefore, the fair intendment of Newman's statement to Judge Leibowitz was that he referred to "his efforts to get the Union leaders and more active Union members back to work," and hence Aufiero's promise to take back "these people" referred to the same people as Newman had in mind (B. A. 3-4). This argument presupposes that Judge Leibowitz's efforts as a conciliator induced a complete surrender from petitioner despite the fact that the Union did not indicate a willingness to compromise its demand that everyone be reinstated. It is much more logical to assume that petitioner, faced with the Union's uncompromising attitude, was also unwilling to compromise.

However, in ascertaining the meaning of the term "these people" there was no need to resort to dubious inferences. Elsie Lenhart, one of the Board's own witnesses, testified (B. A. 432):

> "In the meantime he (Judge Leibowitz) called Mr. Newman and asked him if he would take the rank and file back to the plant tomorrow morning. Mr. Newman said: He certainly would * * *."

It is clear, therefore, that Judge Leibowitz's original question referred to the rank and file employees, and accordingly Aufiero's statement is likewise limited. Lenhart's testimony must be considered with the testimony of the other witnesses as to the condonation incident, in order to determine whether the respondent's finding of condonation is supported by substantial evidence on the record as a whole. When so considered, the ambiguity of the testimony of the other witnesses is resolved, and it becomes abundantly clear that petitioner agreed to take back only the rank and file employees, and not the Union officials, who were not even employees at that time since they had been discharged early in the strike (B. A. 104). This conclusion is emphasized by the fact that petitioner, in its "Last Call to Dinner" letter (B. A. 914-915) dated November 8, 1944, had already issued an invitation to the rank and file employees, but not to the Union officials, to report to the plant on November 11, at 9:00 A. M.

It follows that the Court of Appeals erred in holding that respondent's finding that petitioner condoned the misconduct of the Union officials was supported by substantial evidence on the record as a whole (*Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474).

Very recently the Court of Appeals for the Ninth Circuit held that an employer's agreement to reinstate all *employees* was not to be construed to cover a group of employees who had been properly discharged during the course of a strike. *N. L. R. B.* v. *Warner Bros. Pictures, Inc.*, —— Fed. 2d —— (decided August 20, 1951). There the employer, who had a closed shop agreement with the Alliance union, was subjected to a jurisdictional strike

called by the CSU union. Twenty employees, who were members of Alliance, ceased work in sympathy with the striking CSU. Shortly thereafter, fourteen of them were discharged and the remainder were accepted by the employer as having given up their jobs. The strike, which lasted from March 12, 1945 to October 31, 1945, was terminated by a settlement agreement, to which the employer and both unions were parties. The agreement provided that "all employees return to work immediately."

The Court of Appeals held that the employer had the right to discharge the twenty employees because their activities in striking were in violation of the directives of their own union. The Court of Appeals rejected a contention by the Board that the settlement agreement constituted a waiver of the employer's right to refuse to reinstate the wild cat strikers. The Court pointed out that, when the settlement agreement was construed in the background of the facts of the dispute which engendered it, it was clear that the words "all employees" were not intended to cover persons whom the employer had rightfully discharged during the course of the strike for their illegal conduct in participating in the strike. The Court declared that a contrary interpretation would not be supported by substantial evidence on the record as a whole. It is submitted that the evidence in the case at bar dictates that a similar interpretation be given to Aufiero's statement of November 10, 1944.

The consequences of sustaining petitioner's contention that there was no condonation of the misconduct of the Union officials, are as follows:

1. The case must be remanded to respondent to determine whether the strike was in breach of contract or for an illegal purpose.

2. If, upon remand, respondent determines that the strike was in breach of contract [1] or for an illegal purpose,[2] it must hold that petitioner rightfully refused to reinstate the Union officials.

3. If respondent should determine that petitioner had the right to refuse to reinstate the Union officials for either or both of the reasons just discussed, the rank and file employees, notwithstanding the fact that their own misconduct may have been condoned, are not entitled to an award of back pay by virtue of their group application on November 11th for reinstatement, because such application was conditioned on a demand with which the respondent was under no obligation to comply, namely, the reinstatement of the Union officials (*N. L. R. B.* v. *Mackay Radio and Telegraph Co.*, 304 U. S. 333-347; *N. L. R. B.* v. *Spiewak*, 3 Cir., 179 F. 2d 695, 700; *Matter of Porto Rico Container Corp.*, 89 NLRB 1570; and *Matter of Myers Products Corp.*, 84 NLRB 32, 50).

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[1] *N. L. R. B.* v. *Sands Mfg. Co.*, 306 U. S. 332; *Boeing Airplane Co.* v. *N. L. R. B.*, C. A., D. C., 174 F. 2d 988; *Timken Roller Bearing Co.* v. *N. L. R. B.*, 6 Cir., 161 F. 2d 949; *Hazel-Atlas Glass Co.* v. *N. L. R. B.*, 4 Cir., 127 F. 2d 109; *Matter of Granite City Steel Co.*, 87 NLRB 894, 900; and *Matter of Scullin Steel Co.*, 65 NLRB 1294.

[2] *Hoover Co.* v. *N. L. R. B.*, 6 Cir. 190 F. 2d —— (decided July 9, 1951); *Matter of American News Co.*, 55 NLRB 1302; and *Matter of Thompson Products, Inc.*, 72 NLRB 886.

II. ***Notwithstanding the fact that petitioner may have condoned misconduct of the Union officials, the strikers were not entitled to back pay on the basis of their group application of November 11, 1944 for reinstatement because such application was conditioned on the reinstatement of the Union leaders. Therefore the Court of Appeals erred in sustaining respondent's order awarding back pay to the strikers.***

In Point I, *supra,* it was pointed out that, if the finding of condonation of the misconduct of the Union officials is repudiated and if, on remand, the illegality of the strike is established, none of the 1944 strikers are entitled to back pay because their application for reinstatement was conditioned on a requirement with which petitioner was not obliged to comply, namely, the reinstatement of the Union officials. In this Point II, we assume that petitioner was required to comply with that condition because of the fact that it had condoned the misconduct of the Union officials on the day before the application for reinstatement. Notwithstanding such requirement, we contend that the 1944 strikers are not entitled to back pay because of the conditional nature of their application for reinstatement.

The rule is well established that employees are not entitled to back pay for the period during which they are out on strike. This is true even though the purpose of the strike was to compel the employer to remedy an unfair labor practice. The theory is that by denying back pay to such strikers, employees are encouraged to resort to the administrative process provided for by the Act for a redress of their grievances. To award back pay to such strikers would not only encourage but place a premium upon resort to industrial strife and the interruption of

commerce in order to obtain a redress of wrongs. Thus a discriminatorily discharged employee is entitled to back pay from the date of his discharge, but his co-employees, who strike in protest, are not entitled to back pay for the period during which they are out on strike (*Matter of Hemp & Co.*, 9 NLRB 449, 462; *Matter of Volney Felt Mills, Inc.*, 70 NLRB 908, 910). It is likewise established that, if after participating in such a strike, the employees apply for reinstatement on condition that the discharged employee also be reinstated, they are not entitled to back pay even though the employer was under a legal obligation to reinstate the discharged employee (*Matter of Volney Felt Mills, supra,* at p. 909).

In *Matter of Draper Corp.* (52 NLRB 1477, enforcement denied on other grounds, *N. L. R. B.* v. *Draper Corp.*, 4 Cir., 145 F. 2d 199), the Board adopted a different rule for a case where the employer commits an unfair labor practice after the commencement of a strike. In that case forty employees were discharged for participating in an economic strike. Thereafter thirteen other employees joined in the strike. Subsequently the entire fifty-three employees made a group application for reinstatement. The employer replied that he would not take back the forty original strikers but that he would re-employ the other thirteen. The latter, however, refused to return unless the forty original strikers were also reinstated. The Board held that the discharge of the forty original strikers was discriminatory and that not only they, but the other thirteen, were entitled to back pay from the date of their application for reinstatement, even though the employer had been willing to reinstate the thirteen. The Court of Appeals denied enforcement be-

cause, in its opinion, a wildcat strike was not a concerted activity protected by the Act.

The *Draper* case therefore established the rule that employees are entitled to back pay by virtue of an application for reinstatement conditioned upon a requirement that the employer rescind a discriminatory discharge of another employee occurring after the commencement of the strike, but that they are not entitled to back pay if their application for reinstatement is conditioned on the rescission of a discharge which provoked the strike. For a most forceful argument demonstrating that the *Draper* rule does not effectuate the policies of the Act the Court is referred to Board Member Reilly's dissenting opinion in that case (52 NLRB pp. 1483-1484). The appropriate solution in a case where a strike is prolonged by a discriminatory discharge, just as in a case where a strike is provoked by a discriminatory discharge, is to have the other employees make an unconditional application for reinstatement. Then, after their return to work, the case of the discharged employee can be determined by the Board and if the discharge is found to have been discriminatory, full justice will be accomplished by an award of reinstatement with back pay. Such a solution does not involve the injustice of compelling an employer to award back pay to persons whom he was at all times willing to employ, but who were unwilling to work.

It is also apparent that the *Draper* rule will operate in most cases to deprive an employer of his right to discharge an employee for misconduct committed during the course of a strike. The risk of being compelled to award back pay to a large number of persons whom he was willing to reinstate, in the event that the Board should ultimately

determine that the discharge of the one employee was discriminatory, will, as a practical matter, deter an employer from rejecting an application for reinstatement, conditioned on the reinstatement of the discharged employee. The National Labor Relations Act implicitly gives the employer, as well as the employee, the right to litigate before the Board the propriety of a discharge, but at the risk of being compelled to award back pay to the discharged employee if the litigation is unsuccessful. The *Draper* rule, by increasing the risk to a risk of being compelled to award back pay to many employees if it should be determined that the discharge of the one employee was discriminatory, therefore, as a practical matter, deprives the employer of his right to litigate before the Board the propriety of a discharge occurring during the course of a strike.

The Board's discretion in framing remedies which will effectuate the policies of the Act is broad but not unlimited. *N. L. R. B.* v. *Gullet Gin Co.*, 340 U. S. 361, 362; *Phelps Dodge Corp.* v. *N. L. R. B.*, 313 U. S. 177; and *Republic Steel Corp.* v. *N. L. R. B.*, 311 U. S. 7, 11. In the *Phelps Dodge* case this Court held that one of the policies of the Act is the promotion of production and employment and that such a policy is not effectuated by awarding back pay to persons who fail, without excuse, to accept other employment (313 U. S. pages 197-200). It is submitted that this same policy is also dispositive of a *Draper* type case, and that accordingly this Court should hold that, as a matter of law, the policies of the Act are not effectuated by an award of back pay to persons who are unwilling to work unless the employer cease committing an unfair labor practice against another employee, because such an award

would (1) deprive an employer of his right to discharge an employee for serious misconduct committed during the course of a strike unless the employer is willing to assume the risk of being compelled to pay a ruinous penalty; (2) deprive an employer of the opportunity of litigating his right to discharge an employee for such alleged misconduct unless the employer is willing to assume the risk of being compelled to pay a ruinous penalty; (3) encourage employees to obtain redress for an unfair labor practice committed during the course of a strike by prolonging the strike rather than by resorting to the Board's administrative processes; (4) compensate employees for salary losses incurred while they were unwilling to work; and (5) compel an employer to pay employees for salary losses incurred during a period when he was willing to employ them.

If the Court repudiates the Draper doctrine, it is submitted that the Board's decision in this case must be reversed. As pointed out above, the 1944 strikers, during October and November, 1944, were unwilling, and in fact refused to return to work unless all, including the union officials, were reinstated (B. A. 98; see petition, pages 6-7). Petitioner during this period was willing to reinstate all except about 11 of the union officials (B. A. 826-829, 883-884, 896). Relying on the *Draper* case, the Examiner held that the November 11 application for reinstatement was not conditional because petitioner was under an obligation to reinstate all the strikers, including the union officials (B. A. 98-103). If we assume that petitioner was under such an obligation because it had, on November 10, 1944, condoned the misconduct of the union officials, we nevertheless find that petitioner's entire conduct subsequent to

November 10 is consistent with the position that it had not condoned such misconduct. Hence the employees, other than the union officials, should have returned to work, and the union officials should have submitted their case to the Board for a determination of the disputed condonation issue. If the Board had found that petitioner had effectively condoned their misconduct, complete justice could have been done by directing the reinstatement of the union officials with back pay. However, by applying the *Draper* rule, the Board has punished petitioner for erroneously determining that it had not condoned the misconduct of the union officials, by compelling it to award back pay not only to the union officials but to more than 400 other employees whom petitioner was at all times willing to employ.

III. ***The Court of Appeals erred by not remanding the case to respondent with directions to make findings as to whether the strike was in breach of contract and for an illegal purpose, and, if so, to determine whether the policies of the Act would be effectuated by an award of back pay under such circumstances.***

In this point it is assumed, *arguendo,* that petitioner condoned the misconduct of the Union officials prior to November 11, 1944. Petitioner nevertheless contends that the Board was not entitled to award back pay to any of the 1944 strikers without pursuing one or the other of the following alternatives:

1. The Board could have determined, on the facts, that the 1944 strike was not in breach of contract nor for an illegal purpose, but was a concerted activity of petitioner's employees for their mutual aid and protection, and on the basis of such determination the

Board could have awarded back pay to the 1944 strikers.

2. The Board could have assumed that the 1944 strike was in breach of contract and for an illegal purpose, and on the basis of such assumption it could have rendered an Opinion containing its reasons for determining that the policies of the Act would be effectuated by awarding back pay under such circumstances, and containing its reasons for repudiating its prior decisions to the contrary.

Because the Board failed to pursue one or the other of these alternatives, petitioner contends that the Court of Appeals erred in not remanding the case to the Board.

In two prior cases (*Matter of Thompson Products, Inc.*, 70 NLRB 13, and *Matter of Carey Salt Co.*, 70 NLRB 1099), the precise policy question indicated by the second alternative above, was presented to the Board, and the determination was that, notwithstanding the condonation of the strikers' misconduct[3] prior to their application for reinstatement, the policies of the Act would be effectuated by ordering reinstatement *sans back pay.*

In *Matter of Thompson Products, Inc., supra,* Chairman Herzog said (p. 18):

> "* * * it remains incumbent upon us to take such conduct into consideration in directing the remedy, a matter which lies wholly within the Board's discretion. * * * Unless we are to abandon American News altogether, the least this Board can do to honor its

[3] In the *Carey* case, *supra,* the misconduct consisted of striking in violation of a non-strike clause. In the *Thompson* case, *supra,* the employees struck for the illegal purpose of compelling their employer to recognize their Union, instead of a Union recently certified by the Board.

> own certifications is to decline to ward back pay to those who seek to force employers to disregard them."

If respondent had applied to the case at bar the policy announced in the *Thompson* and *Carey* cases, it would have refused to award back pay to the 1944 strikers. It is true that, in this case, the Board could not, as it did in the *Thompson* and *Carey* cases, have ordered that the strikers be reinstated. But this is because the 1944 strikers had already been reinstated. Hence, petitioner's position on this phase of the case is much stronger than the positions of the respondents in the *Thompson* and *Carey* cases. The latter persisted in refusing to reinstate the strikers whose misconduct had been condoned until compelled to do so by the Board's order, while petitioner had reinstated the 1944 strikers more than a year before the Board even issued its complaint (B. A. 855).

The Board, having adopted a policy which precluded an award of back pay to the 1944 strikers, was bound, if it intended to abandon that policy, to announce the reasons causing it to do so and inducing it to adopt a policy which rewards employees who strike in breach of contract and for an illegal purpose. This Court made such a demand of the Board in *Phelps Dodge Corp.* v. *N. L. R. B.*, 313 U. S. 177, 197. In that case the Board without indicating that the policies of the Act would thereby be effectuated, and without disclosing its reasons for departing from prior decisions to the contrary, ordered an employer to reinstate employees who had obtained equivalent employment elsewhere. This Court determined that the Board had the *legal power* to grant such relief, but held that the case should be remanded to the Board for a determination by it of the

question of whether the policies of the Act would be effectuated by ordering an employer to reinstate employees who had obtained equivalent employment elsewhere. This Court said (pp. 196, 197):

> "* * *. Thus the Board determined only the dry legal question of its power, which we sustain; it did not consider whether in employing that power the policies of the Act would be enforced.
>
> * * *
>
> * * *. All we ask of the Board is to give clear indication that it has exercised the discretion with which Congress has empowered it. This is to affirm most emphatically the authority of the Board."

In *N. L. R. B.* v. *Don Juan, Inc.*, 2 Cir., 178 F. 2d 625, the Court, following *Phelps Dodge, supra,* remanded a case where the Board had ordered the employer to reinstate *with back pay* two employees whom it had discharged pursuant to an illegal union shop agreement, because the Board had failed to determine whether the employer had acted in good faith, and because the Board had failed to indicate whether, if the employer had acted in good faith, it intended to depart from its prior decisions holding that the policies of the Act would not be effectuated by granting *back pay* under such circumstances. It is respectfully submitted that the *Phelps Dodge* and *Don Juan* cases dictated a similar remand in the case at bar, and that the Court of Appeals accordingly erred in not so remanding.

IV. ***The Court of Appeals erred in holding that respondent properly refused to give effect to the settlement agreement of April 5, 1945 whereby the great majority of the employees waived their claims to back pay.***

It has been shown in the petition (page 10) that under this agreement, petitioner assumed five obligations which it performed. Without finding to the contrary, the Trial Examiner held that the settlement agreement imposed certain *implied* conditions on petitioner which it did not perform and that therefore the agreement did not preclude the Board from ordering petitioner to give the employees the back pay which they, through their bargaining agent, had expressly waived by executing the settlement agreement (B. A. 106-108, 121-125).

It is submitted that since petitioner fully performed its five obligations under the settlement agreement, the Board was bound thereby, and should have dismissed the complaint insofar as it involved a claim for back pay in behalf of the 1944 strikers (*N. L. R. B.* v. *Dorsey Trailers,* 5 Cir., 179 F. 2d 589). In that case the Court refused to enforce an order of the Board which upset a settlement agreement between an employer and a union, saying (p. 592):

> "The Board itself is a mere creature of the law. It is no 'Poo Bah' to loose or bind at will. In attempting to put at loose a matter which employees and employer have by lawful procedures put at rest, the Board, we think, exceeds its authority, goes beyond its powers, and, doing so, it sets a pattern of profiting by one's own wrong, which is just as immoral and inequitable in labor as in any other human relations."

It is respectfully submitted that the decision of the Court of Appeals in the case at bar is in conflict with the decision of the Court of Appeals for the Fifth Circuit in the *Dorsey Trailers* case, and that this conflict should be resolved by this Court.

Petitioner does not assert that an employer and a union can, by private agreement, usurp governmental functions and preclude the Board from proceeding against an employer who has violated the Act. Thus if petitioner refused to reinstate the 1944 strikers because of their legitimate union activities, the parties could not, by a private settlement prevent the Board from entering a cease and desist order based thereon. However, we do say that the Board is not warranted in invoking a remedy intended for the benefit of individual employees, such as an order directing reinstatement or back pay, where the employees have waived such rights or have otherwise indicated that they do not desire such remedial action. That this is so is attested by the repeated holdings of this Court that the orders of the Board are remedial and not punitive (*N. L. R. B.* v. *Gullet Gin Co.*, 340 U. S. 361; *Republic Steel Corp.* v. *N. L. R. B.*, 311 U. S. 7, 12 and cases there cited) and by the established policy of the Board not to award reinstatement where an employee testifies that he does not desire it, or back pay beyond the date the employee decided that he no longer desired reinstatement (*Colonie Fibre Co.* v. *N. L. R. B.*, 2 Cir., 163 Fed. 2d 65, 70; B. A. 6-7).

Even-handed justice demands that if an informal undertaking in Court has the effect of a waiver or condonation by the employer, a solemn written engagement settling a labor dispute of long duration must be accorded a like effect. If the employees here involved are entitled to back

pay, it is only because petitioner's voluntary agreement to re-employ them constituted a waiver and condonation of their prior misconduct. A parity of reasoning requires that the same consequences should flow from the agreement of the employees, through their union, to give up their rights to back pay. Hence the award of back pay to the 1944 strikers should in any event be modified so as to eliminate all employees, except the twenty-three persons named in the April 3 letter (R. A. 149) which was incorporated in the settlement agreement (R. A. 129).

The foregoing conclusions are true, even if it be assumed, as the Examiner found, that petitioner subsequently violated certain undertakings implicit in the settlement agreement. Such violations are capable of being remedied by an action for breach of the settlement agreement or by a proceeding before the Board. The fact is that the Board's order in this case does just that as to the subsequent unfair labor practices relied on by the Examiner as the ground for refusing to enforce the settlement agreement. It is undisputed that the employees and the union received everything which petitioner undertook to give by executing the settlement agreement. Petitioner should not, therefore, be deprived of the entire benefit of its bargain merely because of a dubious failure to live up to certain implied provisions of the settlement agreement.

1945 Strike

I. ***The Court of Appeals, after having decided that the violation of the War Labor Disputes Act by the strikers could not be disregarded, erred by determining for itself, in the first instance, the appropriate sanction for such violation. In the alternative, the Court of Appeals erred by failing to hold that the appropriate sanction for the violation of the War Labor Disputes Act was to deny the strikers an award of reinstatement and back pay, or at least an award of back pay.***

In striking on August 28, 1945, one day after the giving of the notice required by Section 8 of the War Labor Disputes Act (Act of June 25, 1943, 57 Stat. 163, 50 U. S. C., §1501 et seq., hereinafter referred to as the "W. L. D. A.") petitioner's employees violated that Act. Petitioner was a war contractor within the meaning of the Act (R. A. 113-114). That Act required petitioner's employees for at least 30 days after the giving of the notice of August 27, 1945, "to continue production under all the conditions which prevailed when such dispute arose". (§8(a)(2).)

In *Hamilton* v. *N. L. R. B.*, 160 F. 2d 465, cert. den. *sub nom. Kalamazoo Stationery Co.* v. *N. L. R. B.*, 332 U. S. 762, the Court of Appeals for the 6th Circuit enforced an order of the Board which awarded back pay from September 18, 1944 to two employees who have struck on September 5, 1944, although the 30 day notice required by the W. L. D. A. had not been given. The Court held that the employees had violated the W. L. D. A., but that such violation did not deprive them of their rights under the National Labor Relations Act. In the case at bar, the Court of Appeals held that the employees, because they struck in violation of the W. L. D. A. were not entitled to

any back pay otherwise accruing during the 30 day period, commencing August 27, 1945, the date the union gave the notice required by the W. L. D. A., but that they were entitled to reinstatement upon application after the expiration of the 30 day period, and to back pay *thereafter* accruing. Thus the decision of the Court below is in conflict with the *Hamilton* decision in the Sixth Circuit to the extent that the latter decision permits an award for back pay accruing with the 30 day cooling off period.

It is submitted that the Court of Appeals, after having decided that the violation of the W. L. D. A. precluded the Board from awarding full back pay, should not have determined for itself, in the first instance, the appropriate sanction for such violation but should have remanded that issue to the Board, upon whom the National Labor Relations Act imposes the primary duty of determining the type of remedy which will best effectuate the policies of the Act.

Assuming, however, that the Court of Appeals had the power, in the first instance, to determine the appropriate sanction for a violation of the W. L. D. A., it is submitted that it decided the issue erroneously. Petitioner contends that the 1945 strikers, because of their violation of the W. L. D. A. were not entitled to either reinstatement or back pay, or at the very most, under the doctrine of the *Thompson* and *Carey* cases, *supra,* they were entitled to reinstatement, but without back pay.

The policies of one Congressional Act are hardly effectuated by awarding back pay to employees who strike in violation of another Congressional Act. The fact that Congress eliminated from the W. L. D. A. a provision contained in an earlier draft, to the effect that violators forfeit

their rights under the National Labor Relations Act (cf. *Hamilton* v. *N. L. R. B., supra,* p. 471), does not clearly indicate that Congress intended that violators thereof should be entitled to all the benefits of the National Labor Relations Act. Many consequences flow from a violation of a law, even though the statute defining the offense does not include such consequences in the prescribed penalty.

In *Southern Steamship Co.* v. *N. L. R. B.,* 316 U. S. 31, this Court held that the Board exceeded its powers in ordering an employer to reinstate seamen who, by striking on board ship, had violated a Congressional Act defining mutiny, even though the strike was provoked by the employer's unfair labor practices. The Court said (p. 47):

> "It is sufficient for this case to observe that the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task."

In the case at bar, the Board's order requiring petitioner to reinstate the 1945 strikers, and to award back pay to those who have already applied for reinstatement, in effect rewards persons who have flaunted the provisions of an important wartime statute designed to secure maximum production of vitally needed materials.

II. *The Court of Appeals erred in holding that the respondent had the power to order petitioner to bargain with the International Union, because the authority, if any, of that Union to represent petitioner's employees was, at most, a joint authority which terminated with the legal death of the Local Union on August 9, 1946.*

As shown in the petition (pages 13-14) neither the Local nor the International union was ever certified as the bargaining agent; only the Local union purported to sign the last collective bargaining agreement *in behalf* of petitioner's employees; and the legal existence of the Local union terminated on August 9, 1946 when its charter was revoked. On these facts, it is submitted that the Local union was the sole bargaining agent of petitioner's employees and that, accordingly, the Court of Appeals erred in enforcing respondent's order directing petitioner to bargain with the International Union.

Assuming, however, that both the International and Local 844 were the bargaining agents, they were joint agents under the established rule of agency that where a person employs two or more persons to represent him in a matter of business, the presumption is that they are joint agents. (*Unterberg* v. *Elder,* 211 N. Y. 499, 501; *Reeves* v. *National Fire Ins. Co.,* 41 S. D. 341, 170 N. W. 575; *Dorsey* v. *Strand,* 21 Wash. (2d) 217, 150 P. (2d) 702, and cases cited in 2 C. J. S., Agency, Section 122(a).)

It is also a well established rule of agency that upon the death of one joint agent, the agency terminates and the surviving agent has no power to act for the principal. (*Hartford Fire Ins. Co.* v. *Wilcox,* 57 Ill. 180; *Rowe* v. *Rand,*

111 Ind. 206, 12 N. E. 377; and *Salisbury* v. *Brisbane,* 61 N. Y. 617.) The revocation of the charter of Local 844 terminated its legal existence (B. A. 8), and was equivalent to death. Consequently the International Union, as the surviving agent, no longer has any power to act for petitioner's employees. There is no evidence that petitioner's employees ever subsequently consented to be represented by the International Union. Therefore, the Board's order directing petitioner to bargain with the International foists upon petitioner's employees, as their sole bargaining agent, a union which they never selected as such. In fact, it makes unions, rather than employees, the principal objects of the Act's protection.

The injustice to petitioner's employees of compelling them to be represented exclusively by the International is obvious. A majority of petitioner's employees, so long as they were represented by Local 844, had the power to select the executive officers who would act as their representatives. However, petitioner's employees constitute but a minute fraction of the membership in the International, and as such would have no control over the selection of the persons, who, under the Board's order, would have power to act as their exclusive bargaining agents.

The Board's order should, therefore, be modified by setting aside the direction that petitioner bargain with the International Union, and by substituting a direction that petitioner bargain with an agent selected by its employees in an election to be conducted by the Board.

CONCLUSION

It is, therefore, urged that the petition for writ of certiorari should be granted.

Respectfully submitted,

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